with a notice to quit and should also make the respondent a party to the proceedings when action was taken for vacant possession of the shop premises at the Magistrate's Court at Segamat, Johor. We do not know on what legal basis the learned counsel was making this submission and no authority was cited to support it. On the facts of this appeal, we are of the opinion that notice to quit need only be served on the parties to the tenancy agreement, viz. Lim Ah Lek and Taplil bin Ithnain, for the appellant had never accepted or recognised the respondent as a tenant. The respondent was regarded by the appellant as a manager of Hwa Mah Rubber Trading which firm was allowed to carry on business in the said premises by the tenants, Lim Ah Lek and Taplil bin Ithnain, who were also co-partners in Hwa Mah Rubber Trading, during the term of the tenancy. It follows that the firm had no interest and did not acquire any interest in the premises known as No. 4, Taman Jementah, Segamat, Johor. However, Order 8 rule 10 of the Subordinate Court Rules 1980 may be relevant and it reads as follows:—

10(1) Without prejudice to rule 6 and subject to the provisions of sections 70 and 71 of the Act the Court may at any stage of the proceedings in an action for possession of immovable property order any person not a party to the action who is in possession of the immovable property (whether in actual possession or by a tenant) to be added as a defendant.

(2) An application by any person for an order under paragraph (1) must be made by notice stating the grounds of the application and supported by affidavit showing that he is in possession of the immovable property in question and if by a tenant, naming him.

(3) The application must be served on the plaintiff and every defendant.

(4) .....

According to the record the respondent was cross-examined about the proceedings in the Segamat Magistrate's Court and he replied that not only he had notice and knowledge of them but was present in court during part of the hearing. If he claimed any interest in the premises at No. 4, Taman Jementah, Segamat, Johor he ought to have taken reasonable steps by applying to the court to be included as a party to the action in addition to the named defendants, viz. Lim Ah Lek and Taplil bin Ithnain, under Order 8 rule 10 of the Subordinate Court Rules 1980. He did nothing ofthe kind but sat back to wait for the outcome of the court action. Learned counsel for the respondent stated from the Bar that when the appellant applied to the learned Magistrate for leave to issue a Writ of Possession pursuant to Order 30 rule 3 and Order 31 rule 4 thereof the respondent attempted to intervene at this stage of the proceedings but the learned Magistrate disallowed him from doing so on the grounds, *inter alia*, that the respondent had received notice of the proceedings as appeared to the trial court sufficient to enable him to apply to the court for any relief which he may be entitled (see Order 30 rule 3(3)), and it was too late in the day to object to the application of the appellant. In our judgment, the learned Magistrate came to the correct decision having regard to the above-mentioned facts.

For the above reasons, we set aside the judgment of the learned Judicial Commissioner and allow the appeal with costs here and below to be taxed. The $500.00 deposit to be returned to the appellant.

Appeal allowed.

Solicitors: *C.C. Aiyathurai & Co.; Wong & Dass.*

LAI CHENG CHEONG v. SOWARATNAM

[F.C. (Wan Suleiman, Seah and Mohamed Azmi F.JJ.) January 8 & April 30, 1983] [Kuala Lumpur — Federal Court Civil Appeal No. 194 of 1982]

Administrative Law — Application for order of certiorari — Decision of Labour Officer — Whether necessary that right of appeal be exhausted — Employment Ordinance, 1955, S. 77 — Rules of the High Court, 1980, Order 55.

In this case the appellant applied for leave to apply for an order of certiorari to quash the decision of a Labour Officer on the grounds (a) that the proceedings at which the decision was made were and appeared to be conducted in a manner contrary to natural justice and (b) that the Labour Officer was biased. The application was opposed on the ground that the appellant had not exhausted his right of appeal to the High Court. The learned trial judge refused the application and the appellant appealed.

Held, an applicant for certiorari is not normally obliged to have exhausted his rights of appeal within the administrative hierachy nor need he have exhausted his right of appeal to a court of law. The appeal should therefore be allowed and the application for leave granted.

Cases referred to:

(1) *Metal Industry Employees Union* v. *Registrar of Trade Unions Ors.* [1976] 1 M.L.J. 220.

(2) *The Land Executive Committee of Federal Territory* v. *Harper Gilfillan* [1981] 1 M.L.J. 234.
(3) *R.v. Postmaster General, ex parte Carmichael* [1928] 1 K.B. 291.
(4) *King* v. *Wandsworth Justices* [1942] 1 K.B. 281.
(5) *Anisminic* v. *Foreign Compensation Commission* [1969] 2 A.C. 147, 195.

FEDERAL COURT.

Lee Hock Beng for the appellant.
Datuk Abu Mansor bin Ali (Senior Federal Counsel) for the respondent.

Cur. Adv. Vult.

Wan Suleiman F.J. (delivering the Judgment of the Court): The appellant had by way of Notice of Motion, applied *ex parte* to the High Court for leave to be given for an application for an order of certiorari to remove into that court and quash the decision of the Labour Officer, one P. Parvadi, made on April 27, 1982 (given in the statement filed pursuant to 0.55 r. 1(2) of the Rules of the High Court 1980) on the grounds:–

(1) That the proceedings at which the said decision was made were and appeared to be conducted in a manner contrary to natural justice.

(2) That the Labour Office was biased.

The Attorney General, in his Notice of Motion opposed the application for leave on the ground that applicant had not exhausted his right of appeal to the High Court under section 77(1) and (2) of the Employment Ordinance 1955.

The learned trial Judge made his decision on the basis that the issue was whether a declaratory relief is available to the applicant when the statute (the Employment Ordinance) already provides a special procedure for appeal.

In his judgment he cited two decisions of this Court. The first was *Metal Industry Employees Union* v. *Registrar of Trade Unions & Ors*,[1] in which the appellant sought for certain declarations including a declaration that the Registrar of Trade Unions had no power under section 2(2) of the Trade Union Ordinance 1959 to rule that workmen of a certain company could not properly be members of a union.

It should be noted that under section 17 of the Ordinance as amended by Act 90, applicable at that time, any person dissatisfied with the opinion of the Registrar given under section 2(2) may appeal to the Minister, but no such appeal had been lodged.

The learned Judge remarked that although that case was an application for a declaration under 0.54A of the Rules of the Supreme Court then, and the application before him is an application for certiorari, the principles are the same. He then went on to cite a passage from Zamir on Declaratory Judgments at page 226 which reads as follows:

"The decision of the court may, accordingly, vary from case to case. It is suggested, however, that a general tendency can be made out. The High Court is usually inclined, unconsciously perhaps, to grant declaratory relief where the alternative remedy is one within its jurisdiction – usually it will be a non-statutory remedy – e.g. damages, an injunction, or a prerogative order. In such cases the court, when making a declaration, is sure not to encroach on jurisdiction assigned to another tribunal. The High Court, on the other hand, is disinclined to entertain a declaratory action where the alternative remedy is by recourse to another tribunal – this will usually be a statutory remedy – e.g., an appeal to a Minister.

There are good reasons for this attitude. First, the Legislature, by conferring jurisdiction in certain matters on a specified tribunal, presumably intended this tribunal to be the ordinary forum for the adjudication of these matters. And secondly, the specified tribunal is often better qualified for dealing with the matters assigned to it.

We should also like to note that in dismissing the appeal, Gill C. J. agreed that the court should not exercise its discretion by refusing to make the declaration because the statutory remedy provided by section 17 better suits the case and will more satisfactorily dispose of the dispute.

The next authority on which his Lordship relied was another decision of this Court. In *The Land Executive Committee of Federal Territory* v. *Harper Gilfillan*[2] an application was filed for a declaration on the true construction of the National Land Code. The appellant applied to set aside the originating summons *inter alia* on the ground that the respondents had failed to exercise their right of appeal under section 418 of the National Land Code.

Section 418(1) reads,

"Any person or body aggrieved by any decision under this Act of the State Commissioner, the Registrar or any Collector may, at any time within the period of three months beginning with the date on which it was communicated to him, appeal therefrom to the Court."

After considering numerous authorities advanced on behalf of both sides, Raja Azlan Shah, Ag. L.P. (as he then was) said at page 237:–

"First of all we have to see the nature of the claim. It is an action for a declaration that conversion is not necessary before sub-division. That is a question of law by virtue of a statutory provision in section 124 of the National Land Code. If the relevant authority commits an error in the interpretation of the section, then an aggrieved party has a right of appeal to the High Court under section 418 of the Code. Parliament has on the ground of public policy found that that is a just and necessary right. But in the same section Parliament has also enacted a special procedure of enforcing that right. If the right had been simply created and no specific method of enforcing it had been provided for, the existing law itself would have provided a method through the court already invested with jurisdiction to determine a claim of that nature. But a specific method having been created by providing a time-limit within which the right may be pursued, it becomes a question whether that method is exclusive or not. That depends, not upon any rigid rule, but upon the intention of Parliament appearing from the Code."

And further down on the same page, his Lordship said:–

"We now ask ourselves, what is there in the National Land Code which bars declaratory relief. Section 418 of the Code must now be looked at. If on a proper reading of it leads one to the conclusion that it is the intention of Parliament to create the right absolutely and independently of any spcific form of remedy, the respondents' action is well maintained. If on the other hand the proper interpretation is that the right and the remedy are unoflatu; that they are not mutually exclusive, that they are part and parcel of the remedy, then the action is misconceived.

Reading section 418 of the Code, we are satisfied that the latter is the correct interpretation. Having regard to the special provision for limiting the time within which to enforce the right, the indications are that Parliament has by using plain and unambiguous language intended the right to be exclusive of any other mode of enforcing it."

Mr. Lee for the appellant contends that section 77 of the Act does not provide an exclusive remedy in that it is (i) permissive, not mandatory, since the word "may" appears in section 77(1) thereof; (ii) it is not the only remedy available to a dissatisfied person, and (iii) it does not oust the right to a judicial review.

It would seem to us that somewhat different considerations govern the exercise of the court's discretion in deciding whether certiorari would apply from those which govern the exercise of its discretion in making a declaratory judgment. For instance the right to certiorari or prohibition may be lost by acquiescence or implied waiver, or unreasonable delay in seeking the relief. See *S.A. de Smith's* Judicial Review of Administrative Action – Fourth Edition page 423.

The existence of alternative remedies have negligible effect on restricting the powers of the courts to provide relief. At page 425 of the same edition appears the following passage, under the heading "Effect of Alternative Remedies":–

"The existence of a right of appeal to the courts from a tribunal's decision does not deprive the courts of power to award prohibition to restrain the tribunal from acting outside its jurisdiction. Nor is the applicant obliged to have exhausted prescribed administrative means of redress before having recourse to the courts."

An applicant for certiorari is not normally obliged to have exhausted his rights of appeal within the administrative hierarchy – see *R.* v. *Postmaster General, Ex. p. Carmichael*[3].

Nor need he have, before he can apply for that remedy, exhausted his right of appeal to a court of law. Thus, in *The King* v. *Wandsworth Justices*[4] two summonses were preferred before Wandsworth Justices by the inspector of weights and measures for the county of London against the applicant, Henry Read, a butcher, charging him with having misrepresented by means of tickets the weight of certain meat which he offered for sale. At the hearing of the summonses the tickets were not produced, and, the applicant's counsel having objected to their absence, the solicitor representing the inspector agreed that the question whether or not the absence of the tickets had been satisfactorily accounted for should be treated as a preliminary issue in the proceedings to be decided before determination of the summonses on their merits. The justices, having heard evidence and arguments, withdrew to consider the matter. On their return after a considerable time, the chairman announced that the applicant was acquitted on one summons and convicted on the other and a fine of 10s. was imposed. The applicant obtained leave to make this application for an order of certiorari to remove the conviction into the court that it might be quashed.

Of particular significance to the present appeal are the words of Viscount Caldecote C.J. at page 284 which reads:–

"It remains to consider the argument that the remedy of certiorari is not open to the applicant because others were available. It would be ludicrous in such a case as the present for the convicted person to ask for a case to be stated. It would mean asking this court to consider as a question of law whether the justices were right in convicting a man

without hearing his evidence. That is so extravagant an argument as not to merit a moment's consideration. As to the right of appeal to quarter sessions, it may be that the applicant could have had his remedy if he had pursued that course, but I am not aware of any reason why, if in such circumstances as these, he preferred to apply for an order of certiorari to quash his conviction, the court should be debarred from granting his application. It has been admitted by the justices that a mistake was made. This court is in a position to remedy that mistake by making an order of certiorari to quash the conviction, and that is the order which this court should make."

We were also referred to a passage in the Fourth Edition of Administrative Law by H.W.R. Wade at pages 36 to 38 which we find most illuminating. The relevant portion is reproduced hereunder:—

"Rights of appeal are always statutory. Judicial review, on the other hand, is the exercise of the court's inherent power to determine whether action is lawful or not and to award suitable relief. For this no statutory authority is necessary: the court is simply performing its ordinary functions in order to uphold the rule of law. The basis of judicial review, therefore, is common law. This is none the less true because nearly all cases in administrative law arise under some Act of Parliament. Where the court quashes an order made by a minister under some Act, it will normally use its common law power to declare that the Act did not entitle the minister to do what he did.

Where the proceeding is an appeal, some superior court or authority will reconsider the decision of some lower court or authority on its merits. ...

Judicial review is a fundamentally different operation. Instead of substituting its own decision for that of some other body, as happens when an appeal is allowed, the court on review is concerned only with the question whether the act or order under attack should be allowed to stand or not."

In *Anisminic* v. *Foreign Compensation Commission*[5] Lord Pearce in dealing with the general jurisdiction of the courts in the administration of justice in Britain said:—

"Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage, while engaged on a proper inquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction. It would turn its inquiry into something not directed by Parliament and fail to make the inquiry which Parliament did direct. Any of these things would cause its purported decision to be a nullity.";

and further down on the same page:—

"The courts have, however, always been careful to distinguish their intervention whether on excess of juridiction or error of law from an appellate function. Their juridiction over inferior tribunals is supervision, not review.

'That supervision goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise' (*Rex* v. *Nat Bell Liquors Ltd.* [1922] 2 A.C. 128, 156).

It is simply an enforcement of Parliament's mandate to the tribunal. If the tribunal is intended on a true construction of the Act to inquire into and finally decide questions within a certain area, the court' supervisory duty is to see that it makes the authorised inquiry according to natural justice and arrive at a decision whether right or wrong."

We would therefore allow this appeal, set aside the order of the court below, and grant the application for leave. Costs to be costs in the cause.

Deposit to the appellant.

Appeal allowed.

Solicitors: *Michael Chen & Lee*

CHIOW THIAM GUAN v. SUPERINTENDENT OF PUDU PRISON & THE GOVERNMENT OF MALAYSIA and Connected Appeals

[F.C. (Wan Suleiman, Salleh Abas and Abdul Hamid F.JJ.) August 18, 1982 & April 30, 1983]
[Ipoh — Federal Court Civil Appeals Nos. 204-208 of 1982]

Administrative Law — Application for declaration that mandatory sentence of death under Internal Security Act unconstitutional and for stay of execution — Claim struck out as disclosing no cause of action — Application for stay of execution pending appeal — Jurisdiction — Criminal Procedure Code, ss. 281 & 300 — Courts of Judicature Act, 1964, s.57(3) — Federal Constitution, Article 42.

Internal Security — Whether sentence of death under Internal Security Act unconstitutional.

Jurisdiction — Mercy, not subject of legal rights — Court has no jurisdiction to hear such matter.

In these cases the appellants had been convicted in the High Court for offences under the Internal Security Act, 1964 and sentenced to death. Their appeal to the Federal Court had been dismissed and the Pardons Board